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NO.

In the Supreme Court of the United States

OCTOBER TERM, 1998

LEONARD EARL DAVIS,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS,
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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31 pp

QUESTIONS PRESENTED

1. Whether the Trial Court erred in finding that there was an agreement to purchase three kilograms of cocaine merely possessed by a Government Agent, when the undisputed evidence in the trial and sentencing proceedings was that Defendant Davis and Co-Defendant Spratt had only enough money to purchase one kilogram, that they never agreed nor attempted to purchase more than one kilogram and that said Agent *would not* sell it on credit?

2. Whether it was prejudicial error for the Trial Court to overrule Appellant's objection to the failure of the court's charge to instruct the jury upon the law of entrapment as applied to the facts of this case?

3. Whether it was prejudicial error for the Trial Court to overrule Appellant's objections to the Court instructing the jury that the term "possession" as used in this case, may be "*constructive* possession", which objection was upon the factually accurate ground that "*constructive* possession" was not raised by any evidence?

4. Whether it was prejudicial error for the Trial Court to overrule Appellant's objection to the Court instructing the jury that they may find the element of "possession" if they find beyond a reasonable doubt that Defendant had had "*constructive* possession", which objection was upon the grounds that "constructive possession" was not raised by any evidence?

QUESTIONS PRESENTED (continued)

5. Whether it was prejudicial error for the Trial Court to overrule Appellant's objections to the Court defining "constructive possession", which objection was upon the grounds that such was not raised by any evidence and it was prejudicial to the Defendant to lead the jury to believe that there might be "*constructive* possession" by the Defendant?

6. Whether the evidence was insufficient to support a finding of guilty of Count One of the indictment herein?

7. Whether the evidence was insufficient to support a finding of guilty of Count Two of the indictment herein?

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LEONARD EARL DAVIS,
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UNITED STATES OF AMERICA,
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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS,
FOR THE FIFTH CIRCUIT

The Petitioner, LEONARD EARL DAVIS, prays that writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals, Fifth Circuit, rendered in these proceedings on June 9, 1998.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, *U.S. v. Davis*, yet unreported, appears at Appendix A.

JURISDICTION

The judgment and opinion of the United States Court

of Appeals, Fifth Circuit, (Appendix A) was rendered on June 9, 1998. Jurisdiction to review said judgment herein by writ of certiorari is conferred on this Court by 23 U. S. C. A. 1254 (1).

CONSTITUTION PROVISIONS, STATUTES AND RULES INVOLVED

None

STATEMENT OF FACTS

This trial began on April 14, 1997.

Ysidro Ramos testified as follows:

In September of 1996 Ysidro Ramos, a *professional informant,* and his partner Pat Bernal aka (Jose), were *hired by Sergeant Coy* to work on a case pertaining to Hispanic bars in Waco, Texas. (R. Vol. I, P. 89-91) Prior to September 22, 1996, he became acquainted with the owners of Fandango Bar, Pedro Hernandez and Geraldo Ramos, and had a discussion with them regarding them finding buyers of cocaine, to which Ysidro Ramos claimed to have access. (R. Vol. I, P. 93-97) It was agreed between Pedro Hernandez, Geraldo Ramos and Ysidro Ramos (CI), that the cocaine procured by Ysidro would be sold to purchasers to be found by Pedro Hernandez and Geraldo Ramos, and that Pedro Hernandez and Geraldo Ramos would broker the sale of Ysidro's cocaine, after adding between $1,000 and $1,500 to the $17,500 charged for same by Ysidro. (R. Vol. I, P. 102) the foregoing conversations between Pedro Hernandez, Geraldo Ramos and Ysidro (CI) were all taped and were conducted entirely in the Spanish language, without any mention of Defendant Davis. (R. Vol. I, P. 106-107, Gov. Exh. Nos. 1, 2, and 2a) On

September 26, 1996 Hernandez advised Ysidro that he and Geraldo had lined up a potential buyer that was "a black guy", but never gave any name. (R. Vol. I, P. 113) On September 27, 1996, at the request of Pedro Hernandez, Ysidro and Pat Bernal (CIs) met with him at Fandangos at 1:30 p.m. (R. Vol. I, P. 113-114). Then, as they all waited for the man who was to pose as Hernandez's boss and owner of the cocaine to show up, a young man named Jessie Salas appeared and started talking to Hernandez and Geraldo Ramos. (R. Vol. I, P, 114-116) Geraldo, Hernandez and said Salas all three went into a corner and started talking and Salas started making some phone calls. (R. Vol. I, P. 116-117) Next, the undercover officer posing as owner of the cocaine, Eleno Alvarado entered the club and was introduced by Ysidro to Hernandez and Geraldo Ramos, after which the undercover officer Alvarado, Hernandez, Geraldo Ramos and Jessie Salas went up and started talking by themselves and Salas started making phone calls. (R. Vol. I, P. 117) Thereafter, Hernandez, Salas, Geraldo and Alvarado went up by themselves away from Ysidro and Pat Bernal. (R. Vol. I, P. 118-119) Later, Defendants Davis and Spratt came into the bar and started talking to Hernandez, Geraldo and Salas, with Davis coming in first. (R. Vol. I, P. 121) Ysidro never met either one of the Defendants. (R. Vol. I, P. 122)

Government agent Eleno Alvardo, posing as Ysidro's boss and possessor of three kilos of cocaine, testified as follows:

When Alvarado entered the bar it was his understanding Hernandez and Geraldo were the ones who were supposed to have the money for the drugs when he arrived. (R. Vol. I, P. 138) After Salas had walked over from the pool

table and made a phone call Alvarado was introduced to him. Alvarado asked Salas what the man he had called had said and Salas replied that he had made the call to a pager and would have to wait for a return call. (R. Vol. I, P. 141) After a while when no return call came in Alvarado told Hernandez he did not like staying around with all of the dope in one place to which Hernandez replied that Salas knew of other black males or other people that would buy at least one kilo of cocaine and if they liked it they would probably purchase the other two. The original price had been set at $17,500, but if they just purchased one kilo it was going to cost them $18,500. (R. Vol. I, P. 142, 143) Hernandez then advised Salas said facts and Salas was present when Alvarado had just told Hernandez the above. Salas then pulled out a piece of paper with what Alvarez assumed to be phone numbers and went to the phone and made a call. (R. Vol. I, P. 143) Alvarado then told them he was in a hurry and Hernandez stated that Salas knows somebody else that wants to buy at least *one* and probably two. (R. Vol. I, P. 144) Salas then advised Avarado that in 20 minutes an individual would be arriving to purchase at least *one* kilo of cocaine at the time Alvarado restated to Geraldo, Hernandez and Salas, that since the person on his way was *only going to buy one* kilo, that the price would be $18,500. Salas, Geraldo and Hernandez were to get out of the transaction $500 for their involvement. At approximately 3:00 p.m. a black male entered Fandangos at which time they sat down at the east end of the bar. Immediately Salas, Geraldo and Pedro converged on the man and began conversing with him. (R. Vol. I, P. 146) Said man was identified by Alvarado as Defendant Davis. (R. Vol. I, P. 146) Hernandez then walked over to Alvarado and told him that the black male, later identified as Defendant Davis, had brought the money with him to purchase *one* kilo of cocaine. (R. Vol. I, P. 148) Alvarado was then

introduced to Defendant Davis and asked Davis if he was going to be able to purchase all three kilos to which Davis replied that he would only buy one, but if what he purchased was good that he could get the money for the other two within an hour. (R. Vol. I, P. 149-150) Alvarado asked Defendant Davis to show the money for the purchase of the *one kilo* of cocaine at which time Davis displayed two rolls of cash and Alvarado told Davis that the first kilo would cost $18,500, at which point Salas pulled Alvarado back and told him that he had already quoted a price of $19,000 for the first kilo of cocaine. Alvarado then went back and told him that the kilo would cost $19,000 and Davis immediately declined saying he would only pay $18,500. (R. Vol. I, P. 151) *Alvarado then* went back and *made an agreement with Salas, Geraldo and Hernandez that they would make $500 off the first kilo.* Davis then advised that he wanted to go to a different location, run a test on the cocaine and if it was good then he would pay for it. (R. Vol. I, P. 152) During this last conversation, Defendant Spratt was seated next to Defendant Davis, appeared to listen to what was said and nodded his head, but Alvarado failed to state whether Spratt was nodding his head in agreement or in disagreement. (R. Vol. I, P. 154) Alvarado said he was in a hurry and did not have time for them to test the cocaine by seeing if it would rock up. Alvarado said the Defendant Spratt told Alvarado and was seconded by Davis that it would only take a few minutes to rock up the kilo of cocaine and they had theretofore purchased some bad cocaine, (R. Vol. I, P. 154-155), but on cross-exam admitted that this was an erroneous statement since it was actually Davis who said the above, (R. Vol. I, P. 182), and that *there was never any negotiation with Spratt.* (R. Vol. I, P. 198) Alvarado agreed that he would take said Defendants out to his car and show them the cocaine, then went to the bath

room, hit an alarm, came back and he and the two Defendants, Hernandez and Salas walked outside to take a look at the cocaine. When they walked out the front door the defendantas were arrested. (R. Vol. I, P. 156-158) Alvarado testified that he attempted by a transmitter to officers outside to record the conversation, *but that it did not turn out because of back ground noise.* Alvarado testified that he never requested Salas, Hernandez or Ramos to contact *any person in particular* in order to sell the cocaine. (R. Vol. I, P. 160) Alvarado, himself, told Salas to tell a black male that all he wanted to do is see the money, the cocaine would be delivered. (R. Vol. I. P. 163) *Alvarado told Salas what to tell the black male and was hoping that Salas would follow his directions,* (R. Vol. I, P. 164) and he knew Salas was being told that and *he made a point to tell him what to tell the black male.* Alvarado had checked out his people and was acting in accordance with their directions, he testified Salas agreed to such directions and immediately afterwards he observed Salas going to the telephone from the bar and making the call and when he came back from the phone Salas told Alvarado that it was a page number he had called and he was waiting for the man to call back. (R. Vol. I, P. 156-157) Salas was to get some money if he got a buyer for the cocaine so he expected Salas to follow his directions and bring a buyer to him. (R. Vol. I, P. 189-190) Alvarado was then fixing to leave when Pedro told him that Salas knows of other black males who would purchase a kilo of cocaine each and that one of them might buy all three. (R. Vol. I, P. 168) Salas then pulled out a piece of paper from his pocket that had what appeared to be telephone numbers and started calling. Alvarado does not know how many phone calls Salas made. After Salas had done his phoning he walked away from the phone and advised Alvarado that one of the black males will arrive in 20 minutes *to purchase one kilo* cocaine. (R. Vol.

I, P. 169-170) The minute Alvarado could get outside he knew everything was going to be transmitted but he taped and stopped the whole transaction and the men were arrested. (R. Vol. I, P. 180-181) *After being asked to name one man that ever bought a car, dope or anything else without even seeing it Alvarado stated referring to Davis, "he was not going to buy this used car without seeing it first, to use your words, 'used car' " and when Davis was arrested he was going out to look at what Alvarado wanted to sell.* (R. Vol. I, P. 183-184) *There was never any conversation or negotiation between Alvarado and Spratt,* (R. Vol. I, P. 198), *except that Davis told Alvarado that they had purchased some bad cocaine before and "Spratt acknowledged".* (R. Vol. I, P. 182, 198) (A meaningless conclusion.)

Sgt. Jose Luis Coy of the DEA Task Force testified as follows:

That about 3:30 a blue and white Chevy truck arrived and parked near the front entrance of the Fandango Club and he observed Jesus Salas exit the night club and go to the passenger side of the pickup, that after a few minutes he and Defendant Davis exited the passenger side of the vehicle and entered the night club, (R. Vol. I, P. 206-207), and that later Salas returned to the vehicle, motioned for the driver by going around to the passenger side, which was empty, and he and Spratt then entered the night club, (R. Vol. I, P. 210) After the arrest, $6,362.00 was recovered from the person of Defendant Davis and $1,100.00 from the person Defendant Spratt, (R. Vol. I, P. 211), and $10,505.00 was recovered from inside the vehicle, (R. Vol. I, P. 217). Thus, *there was not but $17,967 had by both Defendants, not enough to buy even one kilo. Alvarado does not sell it on credit.* (R. Vol. I, P. 175) When Salas went out to the vehicle Coy saw

Salas go out to the vehicle, go up to the passenger side of the vehicle and in it. (R. Vol. I, P. 229-230) After the arrest, Coy and others went to Defendant Davis' home, searched it, and found nothing that was material, (R. Vol. I, P. 232), that the results of said search was omitted from his report, and that he saw no reason to put same in his report (R. Vol. I, P. 233-235) Though Coy found some scales and baking powder in the back bed of the pickup, he knew of no one that had ever seen Defendant Davis in the back of said pickup or messing around with the bed or having anything in it or having anything to do with it. (R.Vol. I, P. 247-248)

Defendant *Davis* testified as follows:

He buys and sells automobiles, some of which are damaged and must be repaired, (R. Vol. II, P. 287) The reason he had cash on him the day of his arrest was because he was going to a car auction the following Monday and cash is required for his purchases of cars. (R. Vol. II, P. 287-288) Spratt also goes to such auctions and buys cars. (R. Vol. II, P. 288) Davis has a wrecker that he drives to the auctions at times. (R. Vol. II, P. 289) Alfred Whiteside, who has been in the car repair business 30 or 35 years does mechanic work on cars he buys. (R. Vol. II, P. 288) Davis thinks that Spratt's wife bought the pickup Spratt was driving at the time. (R. Vol. II, P. 288) Davis usually sells the cars upon a cash down payment and then $50.00 or $25.00 a week thereafter (R. Vol. II, P. 290) His wife works at Plantation Foods for about $250.00 to $300.00 per week. (R. Vol. II, P. 291) Davis does not speak or understand Spanish and he never understood a word the three or four Hispanics said to each other. Salas never called him, he doesn't know if Salas called Spratt, and Davis never met Salas until he came out to the pickup outside Fandangos. Spratt came by and picked him up. (R. Vol.

II, P. 293-299) After picking Davis up Spratt drove down to the beer joint, Fandango Club. A Mexican guy, Salas, came out to the truck and said he wanted Davis to hear about some business proposition. Davis got out of the passenger door, got in the extended cab part of the truck and Salas got in the front seat. Salas' conversation was primarily with Spratt. Salas was telling Spratt about a business proposition, then Spratt asked Davis to go in and see what he was talking about. Davis then went in to get a beer. (R. Vol. II, P. 295) Davis got a beer and then Salas, agent Alvarado and another guy started talking to Davis. (R. Vol. II, P. 310) Alvarado asked him if he would be interested in buying three kilos of cocaine or going somewhere and looking at it. Davis said no. Agent Alvarado just kept asking Davis about 5 or 6 times did he want to pay and Davis said no. Alvarado just kept talking about it and Davis was just holding the conversation with him. Alvarado said that you have no money to do this with, and Davis said no, money is not the problem I have got some money and Davis showed him that he had $3,000 in his front pocket. The other $3,100 was in his right rear pocket. Spratt came in later and sat down and Spratt never said anything that he wanted to go for their deal. Spratt never said anything other than just sitting during the few minutes he was there. When Davis was about to finish his beer Alvarado got up and went to the bathroom. Davis and Spratt then got up and started out the door and as soon as they were out the door in front of Spratt's truck the police came and arrested them. (R. Vol.II, P. 295-298) The only talk about a price for a kilo was by Alvarado and Davis merely replied that he really just was not interested. (R. Vol. II, P. 318) Davis never told Alvarado that he had ever had any cocaine before. (R. Vol. II, P. 319) Salas was the one and only person who introduced Davis to Alvarado. (R. Vol. II, P. 320) The money Davis

had on him was cash he has collected from payments on cars, (R. Vol. II, P. 322), and about $3,800 that had come out of his account because he was going to the auction. (R. Vol. II, P. 322-323) Every time Davis goes to the auction he has cash because he has never gotten into writing a check though he does maintain an account. (R. Vol. II, P. 324) Spratt was also planning to go to the auction on Monday with Davis because Spratt was in the business of buying and selling junk cars from the auction, just like Davis. (R. Vol. II, P. 325) Spratt was not in the bar but something like 10 minutes. (R. Vol. II, P. 326)

Alfred Whiteside testified as follows:

Whiteside is 48 years of age and has been in the business of repairing old cars for 20 years. The last two or three years at least he has done work repairing vehicles purchased by Davis at auctions and elsewhere and has even been to auctions with him. Davis generally exercises good judgment in the purchase of such vehicles and Davis generally has Whiteside work on them if they are damaged vehicles. There is considerable profit made in old cars bought at city auctions, Dallas or wherever. (R. Vol. II, P. 331) Mr. Whiteside has no knowledge of Defendant Davis dealing in cocaine. In order to purchase cars at the auctions you have to have currency. (R. Vol. II, P. 335)

REASONS FOR GRANTING THE WRIT

The decision below conflicts with an applicable decision of this Court and with the decision of other United States Court of Appeals decisions on the same matters.

In recent years, Federal Drug Enforcement has shifted

from its primary policy of apprehension of those actually selling drugs to a policy of enticing and luring those suspected of being users into the higher offense of conspiracy to possess with intent to sell, by means of what is commonly called "reverse sting operations." In each of these operations, Government agents offer to sell drugs to known users, who are generally desperate for money and willing to accept possession of any amount of drugs. Intrinsic in each of these reverse sting operations exists a pervasive danger that a high crime is being induced by sentence entrapment. This is especially so when, as in this case, the alleged conspiracy consists solely of an unrecorded conversation. Thus, it has become critical that this Honorable Court clearly define a Defendant's right to a jury determination of *entrapment in these "reverse sting operations"*, limit the use of the nebulous element of *constructive* possession to those cases where it is *actually* raised, and not permit Government agents to ex parte determine the Guideline sentence range at whatever they wish it to be simply by the amount of drugs they elect to have in their possession at the time of the alleged conspiracy. A definitive decision by this Court is essential to restore and preserve the American concept of justice in drug cases and clarify the following conflicts in the law regarding said three questions:

Sentencing

Since the undisputed testimony of Agent Alvarado was that Davis would only buy *one* kilo, since Salas, after talking on the phone, advised Alvarado that a black male would arrive in 20 minutes to purchase *one* kilo of cocaine, (R. Vol. I, P. 190), since both the combined total of money, had by Davis *and* Spratt was only $17,967, (R. Vol. I, P. 210-211,

217), since Agent Alvarado stated he would not sell even *one* kilo for less than *$18,500*, (R. Vol. I, P. 146, 151), and since Alvarado testified *he does not sell it on credit,* (R. Vol. I, P. 175), the Trial Court's sentencing Davis based upon a conspiracy and attempt to purchase *three* kilos of cocaine *instead of one* was clearly erroneous.

Where a prospective purchaser only has sufficient funds with him to purchase *one* kilo of cocaine, he declares three different times on the occasion in question an objective to obtain *one* kilo and the prospective *seller testifies that he does not sell cocaine on credit,* a statement of said prospective purchaser that *if* several conditions later occur he *could* buy two more kilos, *without any agreement to do so,* does not justify sentencing the Defendant under the Guidelines based upon three kilograms of cocaine.

The sentencing of the Defendant herein under the above facts is in direct conflict with the law declared in *U.S. v. Staufer,* 38 F.3d 1103 (9), wherein the Court states:

> "As the *Barth* court explained, 'the sentencing guidelines are causing courts nationwide to rethink the long-established rule of entrapment.' 990 F.2d at 424." . . .
>
> "In November 1993, the Sentencing Commission amended the Guidelines specifically to provide that:
>
> '[i]f *in a reverse sting [operation]s,* . . . the court finds that the government agent set a price for the controlled substance that was substantially below the market

> value of the controlled substance, thereby leading to the defendant's purchase of significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure may be warranted. (Emph. ours)

Amend. application Note to § 2D1.1, ¶ 486. As this Amendment illustrates, the Sentencing Commission now expressly recognizes that law enforcement *agents should not be allowed to structure sting operations in such a way as to maximize the sentences imposed on defendants,* and that courts may take into consideration the predisposition and *capacity* of the defendant to engage in a deal of the magnitude for which he or she was convicted. . . .

The significance of the Amendment is that it shows that the Sentencing Commission is aware of the unfairness and arbitrariness of allowing drug enforcement agents to put unwarranted pressure on a defendant in order to increase his or her sentence without regard for his predisposition, *his capacity to commit the crime on his own,* and the extent of his culpability. Our conclusion that a finding of sentencing entrapment is warranted in the instant case is motivated by the same concerns, and, as such is fully consistent both with the Amendment and with the sentencing factors prescribed by Congress." (Emph. ours)

Failure, Over Objection, To Charge On Entrapment

The fairly recent cases of *U.S. v. Washington,* 106 F.3d 983 (D.C.), and *U.S. v. Jones,* 839 F.2d 1041 (5), expressly hold that an unwitting person, acting in ignorance of the fact that he is following a *Government agent's* directions may raise the entrapment defense and even require an additional charge on "derivative entrapment." This same Court of Appeals in *U.S. v. Bradfield,* 103 F.3d 1207 (5), in a decision directly conflicting with the holding in this case, holds in a reverse sting case such as this, *where the Government agent made the first overture,* entrapment is raised *even though the record is silent* as to the Defendant's predisposition. Furthermore, *the Supreme Court* in *Sherman v. U.S.,* 78 S.Ct. 819, held that entrapment was raised in a dope case *even though* the undisputed evidence showed the *Defendant had two prior dope* convictions, with one being in the past four years. *In this case, the defendant was not shown to have ever had a prior dope-related charge against him.* Davis never said anything in reply to the agent's offer to sell cocaine except that he really was just not interested. (R. Vol. I, P. 318) The money Davis had with him was from payments on cars and $3,800.00 that had come out of his account because he was going to the auction. (R. Vol. I, P. 322-323) *Davis never told Alvarado that he had ever had any cocaine before.* (R. Vol. I, P. 319)

Clearly the evidence showed that Salas was acting as an agent of Agent Alvarado when he caused Spratt and Davis to drive up in front ot the Fandango Club and when he induced Davis to go in the club and engage in a conversation about dope with Agent Alvarado. *The disputed conversation that next ensued constitutes the entire purported offense in this case.* Thus, it is certain that *Salas and Alvarado, together,*

induced Davis to discuss the dope proposition. The *only possible contention* that the Government can make in denial of the issue of entrapment being raised is that *Agent Alvarado claimed that Davis said he had bought some bad cocaine before that would not rock up. This contention is totally nullified as to the raising of a factual issue since Davis positively testified that he did not make such statement.* (R. Vol. I, P. 319) Though the standard of review as to a charge error is an abuse of discretion. *U.S. v. Gray,* 96 F.3d 769 (5), if there is any evidentiary support whatsoever of a legal defense and the Trial Court's attention is specifically directed to same, a refusal to charge thereon is an abuse of discretion as a matter of law. *U.S. v. Goss,* 650 F.2d 1336 (5). The fact that Defendant Davis denied virtually all of the purportedly incriminating facts adduced by Agent Alvarado does not affect Davis' absolute right to presentation to the jury of his entrapment defense. *Jacobson v. U.S.,* 112 S.Ct. 1535. The Government failed to produce any evidence of predisposition other than the *purported* above statement by Davis, that Alvarado testified the Defendant made, *which was expressly denied by the Defendant.* Defendant Davis' testified that he rejected five or six times the efforts of Agent Alvarado to induce him to purchase the cocaine and finally told him he was simply not interested, *which was affirmative testimony negating predisposition.*

Another case directly analogous to and conflicting with this case on the issue of entrapment is *U.S. v. Timberlake,* 559 F.2d 1325, 1379 (5th), wherein it is held:

> "[5] Once there is some evidence that the government induced the defendant to commit the crime, the question of entrapment becomes a factual one for the jury to decide, *Id.* See also, *United*

> *States v. Kirk,* 528 F.2d 1057 (5th Cir. 1976) . . . . . .*State v. Groessel,* supra. 'It is elementary law that the defendant in a criminal case is entitled to have presented instructions relating to a theory of defense for which there is *any foundation* in the evidence.'"
> *U.S. v. Timberlake,* supra.

As shown, the Defendant Davis was induced by Salas to discuss the dope offer by Agent Alvarado and he totally denied any pre-disposition toward commission of the offense in question, so the issue of entrapment was for the jury.

Charging, Over Objection, That Constructive Possession Would Supply the Element of Possession

The cocaine was on the same premises in the parking lot in the car of the *Government* Agent with whom Davis was allegedly *discussing a possible purchase.* The Government's evidence was simply that Davis agreed to buy the cocaine that was out in the agent's car in the parking lot if he checked it out and found it to be good cocaine. Davis unequivocally testified that neither he nor Spratt ever said anything in reply to the Government agent's offer to sell them the cocaine other than that Davis was "just not interested". (R. Vol. 2, P. 295-298, 318).

In this case, the Defendant was not shown to have ever had a prior dope-related charge against him. Agent Alvarado told Salas to tell a black male, that was then expected to call Salas back, that all Alvarado wanted to do was see the money and the cocaine would be delivered. (R. Vol. I, P. 163) Agent Alvarado had checked with his people and was acting out

in accordance with their directions. He testified that Salas agreed to such directions and immediately afterwards he saw Salas go to the telephone. Salas was to get some money if he got a buyer for the cocaine so Alvarado expected Salas to follow his directions and bring a buyer to him. (R. Vol. I, P. 189-190) After Salas had done his phoning he walked away from the phone and advised Alvarado that one of the black males was going to purchase *one* kilo of cocaine. Agent Alvarado expected Salas to get somebody down, and to fetch somebody, to bring someone to buy the dope. (R. Vol. I, P. 190) Spratt picked up Davis in a truck operated by Spratt and they drove down to the Fandango Club. Salas came out to the truck and he said he wanted Davis to hear about some business proposition, Davis got out of the passenger side of the front seat and got in the back seat and Salas got in the front seat. Salas' conversation was primarily with Spratt. Salas was telling Spratt about a business proposition, then Spratt asked Davis to go in and see what Davis was talking about. Davis then went in to get a beer. (R. Vol. I, P. 295) Salas was the one and only person who introduced Davis to Alvarado. (R. Vol. II, P. 320) Agent Alvarado started talking to Davis, (R. Vol. I, P. 310). *Agent Alvarado asked Davis if he would be interested in buying three kilos of cocaine. Davis said no. Agent Alvarado just kept asking him about it five or six times, did he want to and Davis said no. Alvarado just kept talking about it and Davis was just holding the conversation with him.* Alvarado asked him "You have no money to do this with" and Davis said "No, money is not the problem. I have got some money" and Davis showed him he had $3,000.00 in his front pocket. Spratt came in later and sat down and never said anything that he wanted to go for their deal. Spratt never said anything but just sat there during the few minutes he was there. Davis and Spratt got up and

went out the door and as soon as they got in front of Spratt's truck they were arrested. (R. Vol. I, P. 295-298) Davis testified that he really was just not interested (R. Vol. I, P. 318), that the money Davis had with him was from payments on cars and $3,800.00 that had come out of his account because he was going to the auction. (R. Vol. I, P. 322-323) *and that he never told Alvarado that he had ever had any cocaine before.* (R. Vol. I, P. 319)

It is axiomatic in the decisions of this court and of every other circuit, when "*possession*" or "intent to possess" is an essential element of an offense, that to instruct a jury that a Defendant may be convicted upon proof of "*constructive*" possession, and instructing the jury upon the legal definition therof, when there is no evidence actually raising an issue of "*constructive*" possession, is prejudicial and reversible error, *if raised by specific objection to the Court's charge U. S. v. James,* 819 F.2d 674, 676 (6), *U.S. v. Amerson,* 938 F.2d 116 (8), *U.S. v. Ortega,* 859 F.2d 327, 329-330 (5), *U.S. v. Schubal,* 912 F.2d 952, 955 (8). The decision herein is in direct conflict with the decision in *U.S. v. James,* supra.

The error is especially prejudicial in this case. The cocaine was on the same premises in the parking lot in the car of the *Government* Agent with whom Davis was allegedly *discussing a possible purchase. This error was carefully preserved by specific objections thereto.* (R. Vol. II, P. 345, 346) (Record Excerpts) The Government's evidence was simply that Davis agreed to buy *one* kilo of cocaine that was out in the agent's car in the parking lot if he checked it out and found it to be good cocaine. Davis unequivocally testified that neither he nor Spratt ever said anything in reply to the Government agent's offer to sell them the cocaine other than

that Davis was "just not interested". (R. Vol. 2, P. 295-298, 318). Thus, it is certain that charging the jury that it could convict the Defendant for having the vague and illusory "*constructive*" possession, over objection, was prejudicial to the rights of the Defendant. The only case cited in the Court's opinion herein to support its conclusion otherwise was merely a bank fraud case wherein possession was not even an element of the offense. *U.S. v. Kington*, 875 F.2d 1091, 1098 (5).

Sufficiency of the Evidence as to Conspiracy or Attempt

Sufficiency on each count was properly and timely raised. (R. Vol. II, P. 347) It is fundamental that a Government agent cannot be a co-conspirator, *U.S. v. Livery*, 803 F.2d 1124 (11). Since the only person that there is any evidence that the Defendant Spratt ever so much as spoke a word to pertaining to any dope was Agent Alvarado and Davis, the Government had to prove beyond a reasonable doubt that *Spratt and Davis* made an *agreement*, to purchase and distribute some cocaine. It is accepted by all decisions that "the gist of the offense of conspiracy is '*an agreement*' among the conspirators to commit an offense". *Hanis v. U.S.*, 246 F.2d 781, 786 (8), *U.S. v. Falcone*, 61 S. Ct. 204, *U.S. v. Sarro*, 742 F.2d 1286 (11), and *U.S. v. Gold*, 743 F.2d 800 (11). The law relative thereto has been stated as follows:

> "the essence of the conspiracy charge is an agreement" *U.S. v. Pereria*, 74 S. Ct. 358. (Emph. ours)
>
> "It is the *element of agreement* which serves to distinguish conspiracy from aiding and abetting, which, although often based upon agreement, does not require proof of that fact" . . . *conspiracy*

> *requires proof of an agreement to commit an offense* whereas aiding and abetting does not . . . the crime of aiding and abetting, in contrast, occurs where the Defendant in some sort associates himself with the venture, participates in it as in something that he wishes to bring about, and seeks by his action to make it succeed . . . the language '*community of unlawful intent*' found in these cases, however similar to the 'agreement', upon which the crime of conspiracy is based, *does not rise to the level of 'agreement'* "
> *U.S. v. Cowart*, 595 F.2d 1023, Fn. 10 (5) (Emph. ours)

> "One of the elements that must be proved to sustain a conspiracy verdict is 'the existence of an agreement'" *U.S. v. Ballard*, 663 F.2d 534, 543, (5)

> "There are really two intents required for the crime of conspiracy: an intent *to agree* and an intent to achieve the object of the conspiracy". (Emph. ours)
> 72 Harvard Law Review 920, 935

Not only must there have been sufficient evidence to prove beyond a reasonable doubt an *agreement*, it must have shown the agreement to have been between *Spratt and Davis*, not between Davis and Agent Alvarado. *U.S. v. Livery*, supra.

The only evidence relied on by the Government to prove such agreement is as follows:

At the last of the conversation, Defendant Spratt came in and seated himself next to Davis, appeared to listen to what was said and nodded his head, but Alvarado failed to

state *whether Spratt nodded in agreement or disagreement.* (R. Vol. I, P. 154) The agent claimed Davis said that it would only take a few minutes to test the kilo of cocaine and that they had theretofore purchased some bad cocaine and "Spratt acknowledged" (a meaningless conclusion). (R. Vol. I, P. 182, 198) Agent Alvarado admitted that there was *never any conversation nor negotiations with Spratt.* Alvarado then said he would take Davis and Spratt out to his car and show them the cocaine, then went to the bathroom and hit an alarm. Then when they went out the door the Defendants were arrested. (R. Vol. I, P. 156-158)

It is fundamental that, as stated in the Court's charge, mere preparation, which may consist of planning the offense or devising, obtaining or arranging means for its completion is not an attempt and that an attempt requires some action which is a substantial step towards commission of the crime. In order for a defendant to be guilty of a criminal attempt, the objective acts performed, without any reliance on the accompanying mens rea, [must] mark the defendant's conduct as criminal in nature. The acts should be unique rather than so commonplace that they are engaged in by persons not in violation of the law. *U.S. v. Everett,* 700 F.2d 906, 909 (3), *U.S. v. Innella,* 690 F.2d 834, 835 (11). In other words, the Defendant's objective conduct, taken as a whole, must unequivocally corroborate the required subjective intent to purchase or sell actual narcotics. See *U.S. v. McDowell,* 705 F.2d at 426, 428 (11), *U.S. v. Innella,* supra.

Appellant adopts the facts set out in the hereinabove Statement of Facts. From the evidence herein, construed as favorable for the Government as possible, it is self-evident that no rational trier of fact could find an *actual attempt* by

Defendant Davis to possess cocaine with the intent to distribute same. A mere discussion of *unfulfilled terms* and *conditions* of a *possible* sale will not suffice.

CONCLUSION

For said reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals, Fifth Circuit, and Petitioner accordingly so prays.

Respectfully submitted:

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/s/ W. V. Dunnam, Jr.
State Bar No. 06262000
ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari have been duly mailed to counsel for the United States of America, Seth T. Waxman, U. S. Department of Justice, Room 2720, Washington, D.C. 20530, this _____day of August, 1998.

/s/ W. V. Dunnam, Jr.
W. V. DUNNAM, JR.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-50754
Summary Calendar

FILED
JUN 09 1998

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BRIAN KEITH SPRATT; LEONARD EARL DAVIS,
Defendants-Appellants.

Appeals from the United States District Court
for the Western District of Texas
(W-96-CR-89-5)

June 9, 1998

Before KING, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:*

Defendants-appellants Brian Keith Spratt and Leonard

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* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

Earl Davis appeal their convictions and sentences for conspiracy to possess with intent to distribute cocaine and attempted possession with intent to distribute cocaine pursuant to 21 U.S.C. §§ 841 (a) (1) and 846. We affirm.

Davis and Spratt argue that there was insufficient evidence of an agreement between them or anyone else to posssess with intent to distribute cocaine. The evidence is sufficient to show, beyond a reasonable doubt, that Davis and Spratt had an agreement to possess with intent to distribute the cocaine. *See United STates v. Bermea,* 30 F.3d 1539, 1551-52 (5th Cir. 1994). Any testimony by Davis to the contrary (i.e., that he did not make an agreement with Alvarado or that Spratt did not say anything) is an issue of fact to be decided exclusively by the jury based upon the credibility of the witnesses. Such testimony does not create an issue as to the sufficientcy of the evidence. *See United States v. Garcia,* 995 F.2d 556, 561 (5th Cir. 1993). Spratt's sstatement to Aalvarado about "rocking up" the cocaine makes it clear that he and Davis had agreed to obtain the cocaine and turn it into crack for distributioin.

Davis and Spratt argue that the evidence is insufficient to show beyond a reasonable doubt that they attempted to possess with intent to distribute the cocaine. Spratt and Davis traveled to the Fandango bar carrying almost $18,000, participated in negotiations for the purchase of a kilogram of cocaine for $18,500, promised that they could quickly obtain more money to buy two more kilograms of cocaine if the first one was good, and were walking out to Alvarado's vehicle to take possession of the cocaine to determine its quality when they were arrested. All that remained was for them actually to take possession. The evidence was sufficient to show that

Spratt and Davis intended and had taken a substantial step toward the commission of the crime of possession with intent to distribute cocaine. *See United States v. August*, 835 F.2d 76, 78 (5th Cir. 1987).

Davis and Spratt argue that the trial court erred in instructing the jury on constructive possession. The instruction did not result in reversible error because it was at worst surplusage. It posed no danger of misleading the jury to convict on a theory not supported by the evidence. *United States v. Kington*, 875 F.2d 1091, 1098 (5th Cir. 1989).

Davis argues that the trial court erred in overruling his objections to the court's failure to give a jury instruction on the law of the defense of entrapment. Upon review of the entire record, Davis has failed to show lack of predisposition or government inducement. The district court did not abuse its discretion in not giving the instruction. *See United States v. Branch*, 91 F.3d 699, 712-13 (5th Cir. 1996), *cert. denied sub nom.*, 117 S. Ct. 1466 (1997), *and cert. denied*, 117 S. Ct. 1467 (1997); *United States v. Ivey*, 949 F.2d 759, 768-69 (5th Cir. 1991).

Davis argues that the district court erred in overruling his objections to evidence that he did not have a sales permit and that the cellular telephone was a clone. Davis's defense was based in part upon his assertion that he was in the business of buying junk cars, repairing them, and reselling them, which he offered as his explanation of why he was carrying such a large amount of cash. Whether he had a permit to do so is relevant to the credibility of his asserted defense. Regarding the cellular telephone, the trial court gave a limiting instruction that the telephone evidence was being

offered to show what phone numbers were called from that telephone and that the jury should not consider whether the telephone was stolen. After a review of the record and the district court's instructions to the jury during the trial and before deliberations, we find that the district court did not abuse its discretion in admitting either type of evidence or in denying a mistrial. *See United States v. Coleman*, 78 F.3d 154, 156-57 (5th Cir.), *cert. denied*, 117 S. Ct. 230 (1996); *United States v. Limones*, 8 F.3d 1004, 1007-08 (5th Cir. 1993).

Davis and Spratt argue that the district court erred in basing their sentences on three kilograms of powder cocaine instead of one kilogram. Davis told Alvarado that he had brought money for only one kilogram of cocaine, but that if the cocaine was good, he could get the money to purchase the additional two kilograms within an hour. "That the agreement was subject to a condition does not make it any less an agreement." *United States v. Grassi*, 616 F.2d 1295, 1302 (5th Cir. 1980). The district court did not clearly err in sentencing Davis and Spratt based upon three kilograms of powder cocaine. *See United States v. Mergerson*, 4 F.3d 337, 345-46 (5th Cir. 1993).

Spratt argues that the district court erred in failing to grant his request for a two-level adjustment for a minor role in the offense. Spratt was going to take part in converting the powder cocaine into crack to determine its quality, which was a central part of the conspiracy. The district court did not clearly err in denying the adjustment. *See United States v. Mitchell*, 31 F.3d 271, 278-79 (5th Cir. 1994).

AFFIRMED.

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT
OFFICE OF THE CLERK

June 9, 1998

CHARLES R. FULBRUGE III
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS,LA 70130

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 97-50754 USA v. Spratt
USDC No. W-96-CR-89-5

Enclosed is a copy of the court's decision, and judgment has been entered under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P.'s 39 through 41, and 5TH CIR. RULES 35, 39, and 41 govern costs, rehearings, and mandates. New 5TH CIR. RULES 35.2.10 and 40 require that a copy of the opinion or order sought to be reviewed shall be bound with the petition for rehearing or suggestion for rehearing en banc as an appendix but shall not be marked or annotated. Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if a nonmeritorious suggestion for en banc is made.

Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41 shall not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate a substantial question is to be presented to the Supreme Court. Otherwise, the motion may be denied and the mandate issued immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and will be considering filing a petition for *certiorari* in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file such a petition.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By: /s/ Rhonda Flowers

Rhonda Flowers, Deputy Clerk

Enclosure
Mr Stanley Lee Schwieger
Mr Richard L Durbin Jr
Ms Margaret Feuille Leachman
Mr William V. Dunnam Jr

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 97-50754

FILED
JUL 24 1998

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

LEONARD EARL DAVIS

Defendant - Appellant

Appeal from the United States District Court for the Western District of Texas, Waco

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion 6/9/98, 5 Cir., 1998, _____ F.3d _____)

Before KING, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:

(X) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Carolyn Denien King
United States Circuit Judge

CLERK's NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE

REHG-6